No. 13398

# United States
# Court of Appeals
## For the Ninth Circuit.

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UNITED STATES OF AMERICA,

Appellant,

vs.

TAMOTSU FUJISAKI and RAYMOND C. L. CHEONG, Owners of Twelve (12) Hollycrane "Digger" Type Coin-Operated Machines,

Appellees.

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# Transcript of Record



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**Appeal from the United States District Court, District of Hawaii.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For the Libelant, United States of America;

HOWARD K. HODDICK, ESQ.,
Acting United States Attorney,

District of Hawaii,
Federal Building,
Honolulu, T. H.

For the Respondent, Twelve (12) Hollycrane "digger" Type Coin Operated Machines,

HERBERT K. H. LEE, ESQ.,

304 Hawaiian Trust Bldg.,
Honolulu, T. H.

In the United States District Court
for the District of Hawaii

Civil No. 1123

UNITED STATES OF AMERICA,

Libelant,

vs.

TWENTY-ONE (21) Hollycrane "Digger" Type Coin-Operated Machines,

Respondent.

## LIBEL OF INFORMATION

To the Honorable, the Presiding Judge of the United States District Court for the District of Hawaii:

Comes now the United States of America, by Howard K. Hoddick, Acting United States Attorney for the District of Hawaii, who states and alleges as follows:

I.

That Tamotsu Fujisaki and Raymond C. L. Cheong, presently doing business as the Honolulu Amusement Company, have in their possession in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Twenty-One (21) Hollycrane "digger" type coin operated machines.

II.

The said Twenty-One (21) Hollycrane "digger" type coin operated machines were transported from

the State of Illinois into the Territory of Hawaii since January 2, 1951, and the said Tamotsu Fujisaki and Raymond C. L. Cheong, doing business as the Honolulu Amusement Company, received said Twenty-One (21) Hollycrane "digger" type coin operated machines from the State of Illinois since January 2, 1951.

III.

The said Twenty-One (21) Hollycrane "digger" type coin operated machines are mechanical devices designed and manufactured so that when [3*] operated they will deliver, as the result of the application of an element of chance, property. The said Twenty-One (21) Hollycrane "digger" type coin operated machines thus are gambling devices and the shipment of the said machines from the State of Illinois into the Territory of Hawaii is in violation of Public Law 906 of the 81st Congress, and under the provisions of Public Law 906 of the 81st Congress, the said Twenty-One (21) Hollycrane "digger" type coin operated machines are subject to seizure, condemnation, forfeiture and disposition according to law.

IV.

The said Twenty-One (21) Hollycrane "digger" type coin operated machines are presently stored in a warehouse at the Honolulu Airport, and the legal owners of the said Twenty-One (21) Hollycrane "digger" type coin operated machines are

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Tamotsu Fujisaki and Raymond C. L. Cheong, doing business as Honolulu Amusement Company.

Wherefore, the United States of America prays that due process issue against the said Twenty-One (21) Hollycrane "digger" type coin operated machines; that all persons interested and/or concerned with the same be cited to appear and show cause why the respondent Twenty-One (21) Hollycrane "digger" type coin operated machines should not be adjudged forfeited; that all due proceedings being had therein this Honorable Court condemn the respondent Twenty-One (21) Hollycrane "digger" type coin operated machines as aforesaid, to the United States of America; that a judgment condemning the respondent Twenty-One (21) Hollycrane "digger" type coin operated machines to the libelant may thereupon be made and entered; and for such other and further relief as this Honorable Court may deem proper in the premises.

Dated Honolulu, T. H., this 14th day of January, 1952.

/s/ HOWARD K. HODDICK,

Acting United States Attorney,
District of Hawaii. [4]

In the United States District Court
for the District of Hawaii

United States of America,
District of Hawaii—ss.

Howard K. Hoddick, being first duly sworn, on oath, deposes and says:

That he is Acting United States Attorney for the District of Hawaii; that he has read the above and foregoing Libel and knows the contents thereof; that he is informed and verily believes that the facts and things therein set forth are true.

/s/ HOWARD K. HODDICK,
Acting United States Attorney,
District of Hawaii.

Subscribed and sworn to before me this 14th day of January, 1952.

[Seal] /s/ G. C. ROBINSON,

Deputy Clerk, United States District Court for the District of Hawaii.

[Endorsed]: Filed Jan. 14, 1952. [5]

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[Title of District Court and Cause.]

ORDER

In this cause, by agreement of the parties as evidenced by the signatures of their respective counsel, it is ordered that the Libel of Information and Monition heretofore filed in this cause be amended

so as to make the said Libel of Information and Monition refer to Twelve (12) Hollycrane "digger" type coin operated machines instead of Twenty-One (21) Hollycrane "digger" type coin operated machines as set out in the original Libel of Information and Monition.

The Twelve (12) Hollycrane "digger" type coin operated machines against which the amended Libel of Information and Monition now lies bear the following serial numbers: 1525-30; 1526-30; 1528-30; 1529-30; 1530-30; 1459-30; 1460-30; 1461-30; 1462-30; 1463-30; 1466-30; 1468-30. [7]

Dated Honolulu, T. H., this 20th day of February, 1952.

/s/ J. FRANK McLAUGHLIN,

Judge, United States District Court for the District of Hawaii.

HOWARD K. HODDICK,

Acting United States Attorney, District of Hawaii, Attorney for Libellant.

By /s/ NAT RICHARDSON, JR.,
Asst. United States Attorney,
District of Hawaii.

/s/ HERBERT K. H. LEE,
Attorney for Respondent.

[Endorsed]: Filed Feb. 20, 1952. [8]

[Title of District Court and Cause.]

## ANSWER TO AMENDED LIBEL OF INFORMATION

To the Honorable, the Presiding Judge of the United States District Court for the Territory of Hawaii:

Come now Tamotsu Fujisaki and Raymond C. L. Cheong, respondents, and answering the amended Libel of Information in the above-entitled cause, allege as follows:

I.

Answering paragraph (I), respondents admit the allegations of fact set forth therein.

II.

Answering paragraph (II), respondents admit the allegations of fact set forth therein.

III.

Answering paragraph (III), respondents state that the shipment of the said Twelve (12) Hollycrane "digger" type coin operated machines from the state of Illinois into the Territory of Hawaii is not in violation of Public Law 906 of the 81st Congress because at the time of said transportation, said machines had "closed shutes" fastened with explosive bolts making it physically impossible, for said machines to deliver any money or property; that the said machines at the time of shipment and transportation were not gambling devices as defined in Public Law 906 and, accordingly, are not subject to seizure, condemnation, forfeiture and disposition according to law. [10]

IV.

Answering paragraph (IV) therein, respondents admit the allegations of fact contained in paragraph (IV) therein.

Wherefore, respondents pray that the Libel of Information and Monition be dismissed.

Dated Honolulu, T. H., this 20th day of February, 1952.

TAMOTSU FUJISAKI and
RAYMOND C. L. CHEONG,
By /s/ HERBERT K. H. LEE,
Attorney for Respondents.

Territory of Hawaii,
City and County of Honolulu—ss.

Herbert K. H. Lee, being first duly sworn on oath, deposes and says: That he is the attorney for the respondents, Tamotsu Fujisaki and Raymond C. L. Cheong; that he has read the above and foregoing Libel and knows the contents thereof; that he is informed and verily believes that the facts and things therein set forth are true.

/s/ HERBERT K. LEE.

Subscribed and sworn to before me this 20th day of February, 1952.

[Seal] /s/ MILDRED K. MAEMORI,
Notary Public, First Judical Circuit, Territory of Hawaii.

My commission expires Nov. 31, 1952.

[Endorsed]: Filed Feb. 20, 1952. [11]

[Title of District Court and Cause.]

ORDER

The above-entitled matter having come on regularly for hearing on the 26th day of February, 1952, and the Court after examining the record, hearing the evidence stipulated by the United States of America and the Intervener-Respondents Tamotsu Fujisaki and Raymond C. L. Cheong, through their respective attorneys, Nat Richardson, Jr., Assistant United States Attorney, and Herbert K. H. Lee, Esq., and listening to the arguments by counsel, and being fully advised in the premises and having rendered its oral decision finding that from all the evidence stipulated and adduced in said cause that the Government had failed to establish that the twelve (12) Hollycrane machines involved herein were gambling devices at the time their shipment was in transit and that the shipment of said machines was in violation of Public Law 906.

The Court finds from the evidence and the records herein that the said twelve (12) Hollycrane machines were not gambling devices at the time of its shipment from the State of Illinois to Hawaii and accordingly said shipment was not in violation of Public Law 906.

The Court further finds that Tamotsu Fujisaki and Raymond C. L. Cheong, are the owners of said twelve (12) Hollycrane machines and are entitled to the immediate and exclusive possession [13] thereof.

Now Therefore, It Is Hereby Ordered, Adjudged,

and Decreed, that Tamotsu Fujisaki and Raymond C. L. Cheong are the owners and entitled to the immediate and exclusive possession of said twelve (12) Hollycrane machines hereinafter described.

It Is Further Ordered that the Libel of Information heretofore filed in this Court in said cause be and the same is hereby dismissed.

It Is Further Ordered that the Libellant forthwith deliver to said Tamotsu Fujisaki and Raymond C. L. Cheong the said twelve (12) Hollycrane machines bearing serial numbers: 1525-30; 1526-30; 1528-30; 1529-30; 1530-30; 1459-30; 1460-30; 1461-30; 1462-30; 1463-30; 1466-30; 1468-30 its tools, accessories and appurtenances.

Dated Honolulu, Hawaii, 28th day of February, 1952.

/s/ D. E. METZGER,
Judge of the Above-Entitled Court.

Approved as to Form:

/s/ NAT RICHARDSON, JR.,
Asst. United States Attorney,
District of Hawaii.

[Endorsed]: Filed Mar. 5, 1952. [14]

[Title of District Court and Cause.]

ORDER

This cause came on to be heard before the Honorable Delbert E. Metzger, Judge of the United States District Court for the District of Hawaii, on February 26, 1952, upon the record in the cause and stipulation of counsel, and, after hearing evidence and the argument of counsel, the Court, being fully advised in the premises, rendered its oral decision finding that:

1. The Twelve (12) Hollycrane "digger" type coin operated machines involved in this matter, bearing serial numbers: 1525-30; 1526-30; 1528-30; 1529-30; 1530-30; 1459-30; 1460-30; 1461-30; 1462-30; 1463-30; 1466-30; 1468-30 were shipped from the State of Illinois to the Territory of Hawaii after January 2, 1951, and were received in the Territory of Hawaii by the Intervenor-Respondents Tamotsu Fujisaki and Raymond C. L. Cheong after January 2, 1951. [16]

2. The aforesaid Twelve (12) Hollycrane "digger" type coin operated machines are gambling devices but by reason of the fact that the machines had "closed shutes" fastened with bolts making it physically impossible for the said machines to deliver any money or property; that the said machines were not gambling devices at the time of said transportation from the State of Illinois to the Territory of Hawaii and therefore do not come within the purview of Public Law 906 and accord-

ingly are not subject to seizure, condemnation, forfeiture and disposition according to law.

Now Therefore It Is Hereby Ordered that the said Intervenor-Respondents Tamotsu Fujisaki and Raymond C. L. Cheong are entitled to possession of the said Twelve (12) Hollycrane "digger" type coin operated machines.

It Is Further Ordered that the Intervenor-Respondents Tamotsu Fujisaki and Raymond C. L. Cheong retain the said Twelve (12) Hollycrane "digger" type coin operated machines in their possession without disposing of the same pending an appeal by the United States of America to the Ninth Circuit Court of Appeals in San Francisco, California.

Dated Honolulu, T. H., this 28th day of February, 1952.

.....

Judge, United States District Court for the District of Hawaii.

Approved as to Form:

.....

Herbert K. H. Lee, Attorney for Intervenor-Respondents.

Advised by Mr. Nat Richardson, Jr., Assistant United States Attorney, District of Hawaii, that this order had been refused by the court.

[Endorsed]: Filed Mar. 6, 1952. [17]

[Title of District Court and Cause.]

ORDER

In this cause both parties, that is, the United States of America, Libelant, and Tamotsu Fujisaki and Raymond C. L. Cheong, Intervenor-Respondents, submitted proposed findings to the Court, and the Court, after examining the proposed findings submitted by both parties, is of the opinion and so finds that the findings submitted by the Intervenor-Respondents more accurately state the views of the Court.

It Is Accordingly Ordered that the order submitted by the Intevenor-Respondents be filed as the findings of the Court and that the findings submitted by the Libelant be refused.

Dated Honolulu, T. H., this 28th day of February, 1952.

/s/ D. E. METZGER,

Judge, United States District Court for the District of Hawaii.

[Endorsed]: Filed Mar. 6, 1952. [19]

In the United States District Court
for the District of Hawaii

Civil No. 1123

UNITED STATES OF AMERICA,

Libellant,

vs.

TWELVE (12) Hollycrane "Digger" Type Coin Operated Machines,

Respondent.

## JUDGMENT

The above-entitled cause came on regularly for trial without a jury in the above-entitled Court before the Honorable Delbert E. Metzger, Judge Presiding, on the 26th day of February, 1952, the United States of America, Libellant, being represented by Nat Richardson, Jr., Assistant United States Attorney, and the Intervenor-Respondents Tamotsu Fujisaki and Raymond C. L. Cheong, being represented by Herbert K. H. Lee, Esq., as their attorney, and all of the evidence having been stipulated orally in Court in this cause on behalf of both the Libellant and the Intervenor-Respondents, and thereafter, the cause having been submitted and the Court having considered the same, and being fully advised in the premises and having heretofore made and filed its Findings of Fact and Conclusions of Law;

Now, Therefore, It Is Ordered, Adjudged and Decreed as follows:

I.

That the Twelve (12) Hollycrane Machines involved herein bearing serial numbers: [21] 1525-30; 1526-30; 1528-30; 1529-30; 1530-30; 1459-30; 1460-30; 1461-30; 1462-30; 1463-30; 1466-30; 1468-30; were not gambling devices at the time their shipment was in transit from the State of Illinois to the Territory of Hawaii.

II.

That the shipment of said Twelve (12) Hollycrane Machines was not in violation of Public Law 906.

III.

That Tamotsu Fujisaki and Raymond C. L. Cheong are the owners of said Twelve (12) Hollycrane Machines and Libellant is ordered to return the same to Tamotsu Fujisaki and Raymond C. L. Cheong, Intervenor-Respondents.

Dated Honolulu, Hawaii, on this 10th day of March, 1952.

By Order of the Court

/s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, Territory of Hawaii.

[Endorsed]: Filed and Entered Mar. 10, 1952. [22]

[Title of District Court and Cause.]

## NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT UNDER RULE 73 (b)

Notice is hereby given that the United States of America, Libelant above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 10, 1952.

Dated at Honolulu, T. H., this eleventh day of March, 1952.

HOWARD K. HODDICK,
Acting U. S. Attorney,
District of Hawaii.

By /s/ NAT RICHARDSON, JR.,
Assistant U. S Attorney,
District of Hawaii.

[Endorsed]: Filed March 11, 1952. [24]

[Title of District Court and Cause.]

## STAY OF JUDGMENT

In this cause it is ordered that the final order and judgment heretofore entered be stayed pending an appeal now noticed by the libelant to the Ninth Circuit Court of Appeals in San Francisco, California.

Dated: Honolulu, T. H., this 12th day of March, 1952.

/s/ D. E. METZGER,
Judge, United States District Court for the District of Hawaii.

[Endorsed]: Filed March 12, 1952. [26]

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[Title of District Court and Cause.]

## DOCKET ENTRIES

1952

Jan. 14—Filing Libel of Information. Issuing Monition. Certifying four copies for service.

Jan. 15—Filing Marshal's Returns. (Executed.)

Feb. 1—Filing Stipulation, 2-24-52.

Feb. 20—Filing Order. Filing Answer to Amended Libel of Information.

Feb. 26—Enter proceedings at hearing. Argument by respective counsel. The Court ruled that the Government does not have a case.

Mar. 5—Filing Order (Libel dismissed.) Machines ordered returned to claimants. (D. E. Metzger.)

Mar. 6—Filing Order (refused).

Mar. 10—Filing Judgment. Entered 4:10 p.m.; not gambling devices; not in vio. Pub. Law 906; ordered returned. (D. E. Metzger.)

Mar. 11—Filing Notice of Appeal to the United States Court of Appeals for the Ninth Circuit under Rule 73 (b). Copy of notice mailed to Counsel for Defendant.

Mar. 12—Filing Stay of Judgment.

May 9—Filing Designation of Record on Appeal.

May 13—Filing Reporter's Transcript of Proceedings. [27]

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[Title of District Court and Cause.]

## DESIGNATION OF RECORD ON APPEAL

In making up the transcript of the record on appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause, please include the following:

1. Libel of Information, filed January 14, 1952.
2. Order amending Libel, filed February 20, 1952.
3. Answer to Amended Libel of Information.
4. Order filed March 5, 1952.
5. Order denying Libelant's proposed findings, filed March 6, 1952.
6. Order submitted to Court by Libelant and refused, filed March 6, 1952.
7. Judgment filed March 10, 1952.
8. Transcript of Proceedings had on February 26, 1952.

9. Clerk's Docket Entries.
10. Notice of Appeal.
11. This Designation of Record on Appeal.

Dated at Honolulu, T. H., this 9th day of May, 1952.

UNITED STATES OF AMERICA,
Libelant.

By /s/ HOWARD K. HODDICK,
Acting United States Attorney, District of Hawaii, Attorney for Libelant.

[Endorsed]: Filed May 9, 1952. [29]

In the United States District Court for the
District of Hawaii
Civil No. 1123

UNITED STATES OF AMERICA,

Libelant,

vs.

TWELVE (12) Hollycrane "Digger" Type Coin-Operated Machines,

Respondent.

TRANSCRIPT OF PROCEEDINGS
February 26, 1952

Before: Hon. Delbert E. Metzger, Judge.

Appearances:

NAT RICHARDSON, JR.,
Asst. United States Attorney,
Appearing for the Libelant.

HERBERT K. H. LEE,
Appearing for the Respondent. [31]

Proceedings

The Clerk: Civil No. 1123, United States of America, Libellant, versus Twenty-one Hollycrane Digger Type Coin-Operated Machines, Respondent, case called for hearing.

Mr. Richardson: We are ready, if your Honor please.

Mr. Lee: We are ready, your Honor, and with the permission of the District Attorney's office I

would like to explain what the issue is before this Court.

It is an in rem proceeding against Twelve Machines called Hollycrane Machines. The issues of fact and law have been boiled down by the pleadings.

The information alleges that my clients are presently doing business as The Honolulu Amusement Company in Honolulu, and that they are the owners and possessors of these twelve machines which were being stored at the time of seizure. In——

By the way, those facts have been admitted by our answer.

It is also stated in the information that these machines were transported from the State of Illinois into the Territory of Hawaii since January 2nd, 1951, and these two parties, my clients, received these machines since January 2nd, 1951.

For the record the original libel of information was a proceeding against Twenty-one machines, but it was discovered later and by agreement of counsel an order was [32] entered, as I understand it, by the Court amending the libel to be presented against only twelve machines, the other nine having been shipped prior to January 2, 1951. These facts we admit.

Now, in paragraph III where the gist of the dispute comes in, the libel states that these twelve machines are mechanical devices designed and manufactured so that when operated they will deliver as a result of the application of an element of chance property. In other words, the information follows the language of the bill—not the bill actually the

public law involved, which contains that same language in the Act. In other words, "these machines are mechanical devices designed and manufactured in the State of Illinois so that when operated these machines will deliver, as the result of an application of an element of chance, property."

Our answer brings that question into focus. Our answer states as to paragraph III that these twelve Hollycrane machines when shipped from the State of Illinois "is not in violation of Public Law 906 of the 81st Congress because at the time of their transportation said machines had closed chutes fastened with explosive bolts making it physically impossible for said machines to deliver any money or property; that the said machines at the time of shipment and transportation were not gambling devices as defined in Public Law 906 [33] and, accordingly, are not subject to seizure, condemnation, forfeiture and disposition according to law."

The Court: The point is, as I get it, that the machines are not capable of delivering any property?

Mr. Lee: Yes, that is right. And I believe counsel, representing the District Attorney's office, is cognizant of that and has stated to me and is willing to state to the Court——

The Court: In other words, just a fraud?

Mr. Lee: No, I won't admit it is a fraud, your Honor. All we are concerned with at this moment, your Honor, is that these machines when transported from the State of Illinois, the chutes were closed, fastened with bolts so that it was physically impossible for these prizes to be delivered.

Mr. Richardson: We will stipulate, if your Honor

please, that there was a shield—I don't know whether you would call it a shield—but some enclosure over the chutes so that if some object was picked up inside the machine it would not come out. The machines were blocked at the time of transportation. They were in that condition.

Mr. Lee: That is correct, your Honor. That part, the record shows, is stipulated as far as our answer goes.

The Court: Yes.

Mr. Lee: It therefore becomes a question of law, [34] your Honor.

The Court: What is the law under which the seizure was made?

Mr. Lee: Public Law No. 906.

The Court: How does that read?

Mr. Lee: I have got the official copy.

The Court: Maybe we should hear from Mr. Richardson on that. What do you claim to be the authority?

Mr. Richardson: If your Honor please, Public Law 906, which is the recent Act prohibiting the interstate transportation of gambling devices, in Section (a) (2) sets out as follows:

"The term 'gambling device' means any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property."

If your Honor please, we insist that means the

fact that these machines were designed and manufactured to deliver property, and even though it was closed during the shipment, it still brings it under the Act; that the words "designed and manufactured" mean that the manufacturer of a machine intended it to be used or fit or suitable to be used in that sense, even though at the time of shipment the chute [35] was closed off.

I think that is the whole point in this lawsuit. The Act does not prohibit the transportation of a device capable of being used at that time as a gambling device. If it is designed and manufactured so that it may be used as a gambling device, it comes under the Act.

The Court: I am inclined to say, Mr. Richardson, that no matter if the machine, by some change, could be used as a machine of gambling or chance, if, in its manufacture and shipment, that was closed and sealed off so that the design of the manufacturer was that it couldn't be so used, I think that is it.

Mr. Richardson: If your Honor please, I will agree that during the time of shipment while that machine was coming over here it could not have been used in such a manner as to deliver property, but under the Act it says if it is designed or manufactured to operate—it doesn't have to be in condition at the time of shipment—if it is designed or manufactured so that it could operate after its arrival, the Act would cover it. If the Court please, I looked up——

The Court: You could take many implements,

perhaps a scale of balance and many other things, and turn them into a use for chance and gambling purposes.

Mr. Richardson: But they would have to be designed and manufactured for that use. This particular machine, the [36] only use it could possibly have is for a gambling device. There is no other use it could have.

The Court: It looks to me as though it was designed at the factory just as a swindle.

Mr. Richardson: Well, if your Honor please, that might be a gambling device.

Mr. Lee: May I assist the Court in this matter?

The Court: Go ahead. Now, I have got the other side of the picture.

Mr. Richardson: I would like to say this to the Court—excuse me, sir. I looked up in "Words and Phrases" and tried to get some definitions of the word, "design." I found two cases which may be close or may not. Anyway, it was defined as "design means intending or designated; also means appropriate, fit, prepared or suitable."

If this machine was prepared, fit or suitable for a gambling device after arrival, I think the Act would cover it, although agreeing with Mr. Lee at the time of transportation the chute was closed.

I found a Federal case, if the Court please, also defining gambling devices. This is Washington Coin Machine Association versus Callahan, 142 Federal Second, page 97. It is a case from the Circuit Court of Appeals of the District of Columbia. The machine involved in this particular case was one of

these pin-ball machines where they shoot [37] marbles around a board. That, of course, is not applicable here, but they define gambling devices in this case, and the Court says that it is obvious that crap table, lottery or bookkeeping are some form of gambling schemes or devices, but "to gamble, as is well known, is to risk one's money or other property upon an event, chance or contingency in the hope of the realization of gain, and the test as to whether a particular machine combination constitutes a gambling device is, as the 7th Circuit Court of Appeals said, whether it is adapted, devised and designed for the purpose of playing any game of chance for money or property."

In other words, if the Court please, if this machine was intended for use as a gambling device the Act prohibits transportation. That is the only thing this machine could be used for. There is no other game or anything else that could be played on it. And the fact that it was manufactured in the way it was would bring it under the Act.

The Act could have said very easily that the transportation of a machine capable of being used at that time is prohibited, but they didn't. They wrote the Act to prohibit the transportation of machines designed and manufactured to be used as a gambling device. That is our whole case right there.

Mr. Lee: May I answer there?

The Court: Go ahead. [38]

Mr. Lee: There are thousands upon thousands of cases involving the question of what machines may be said to be gambling devices under the State

cases and under cases involving risk, and there are cases which hold both ways. But you will find running along the entire stream of cases it depends on the particular case involved and the particular statute involved in the State.

Now, let us bear in mind as far as this proceeding is concerned, that this is what the government is alleging is a violation of a Federal Statute which prohibits transportation of gambling devices in interstate and foreign commerce. The history of this Bill reveals that it came about as the result of the recommendations of the Attorney General's conference on organized crime back in 1949-1950. Mr. McGrath headed that conference, and as a result of that conference all of the Attorney Generals drafted, got together and recommended a bill to be passed by Congress.

The main object of this bill was to assist the various states in the enforcement of gambling, and when this bill was submitted by the Attorney General's office—it was submitted to the Senate at first and there were witnesses pro and con.

Now, the record shows—and I have the report of the proceedings here—shows that witnesses at the Bill's hearing before the Senate Committee of Interstate and Foreign [39] commerce criticized the bill because the definition of gambling device was so broad as to cover many types of mechanical devices not manufactured or normally used for gambling purposes. In reporting the bill out favorably the Committee felt that the Federal Government should extend to states a system—assistance in strengthening the state and local law enforcement.

On the other hand, the Committee emphasized that Federal law enforcement in the field of gambling cannot and should not be considered a substitute for state and local law enforcement in the field.

It made this comment that whether gambling flourishes in that particular community depended on the local enforcement agency.

Now, the bill was passed by the Senate in the form drafted by the Attorney General's conference. When the Senate version of the bill was heard before the Committee on Interstate and Foreign commerce of the House, the House report stated the following:

"The only thing that the Federal Government is being asked to do under this bill is to stop in the channels of interstate commerce the shipment of these machines which the states are powerless to keep out of the channels of interstate commerce."

The bill, as passed by the Senate, contained the following definition of gambling device—and this is the [40] answer to the contention of the government. The bill, as passed by the Senate, contained the following definition of gambling device. I quote:

"Any machine or gambling device or parts thereof designed or adapted"—these are the words used by the government attorney—"or adapted for gambling or any use by which the user as a result of the application of any element of chance may become entitled to receive directly or indirectly anything of value."

And the report goes on to answer this definition. In their testimony before the Committee the At-

torney General stated that this definition—in other words, they admitted—this definition could possibly be construed to include pinball machines and similar devices which are played purely for amusement and which do not have pay-off devices which returned to the player anything of value.

In his communication addressed to the chairman of the committee dated June 1st, 1950, the Attorney General's representative pointed out, however, that it was the intention of the Department of Justice that machines manufactured and used purely for amusement should be excluded from the provisions of this bill. In view of this testimony because of its intention to exclude pinball machines and similar amusement machines as well as certain machines and devices commonly used, for instance, at carnivals and livestock shows, your [41] committee decided to adopt a definition of gambling device different from the one contained in the Senate bill.

Gambling device is defined by the committee amendment as now contained in Public Law 126 and was—watch the difference between the Senate and the House version. The House version now defines gambling device as any machine or mechanical device designed and manufactured—instead of designed and adapted—to operate by means of insertion of a coin, token or similar object and designed and manufactured so that when operated it may deliver as the result of the application of an element of chance any money or property.

And I also want to state to the Court that the manufacturing company at the time the respond-

ents here purchased the machines offered three models of these machines, one of which would have fitted into the definition of this bill. These three models are as follows:

1. The standard model with an open chute. In other words, instead of a closed chute, it is an open chute, so that the property can be delivered to the player. This model gives the player the opportunity to take the prize out of the door in front of the machine. Now, that would be that type of machine, but by stipulation with the District Attorney's office, the machine involved is the second type. It is called the closed chute model.

This model operates as follows: [42]

The player does not get the prize as the front door is closed. Now, this is the type of machine. And the third type is the three-play model. This also has a closed chute and the player does not get the prize. There are three types of machine. This is the second type of machine, which makes it physically impossible to get the prize because the chute or the opening of the machine must be open before the prize can come out.

Now, it is said by the attorney for the government what were these machines intended for, that it was meant to cover any type of machine that was intended to be used as a gambling device. We all know that a pinball machine can be used for amusement and so can these machines, because the claws of these machines could pick up prizes and if it picks up prizes you can have some form of amusement.

It all depends on how, after the machine has arrived in a state, how it is altered, how it is adapted so that when operated it would be given an element of chance so that property could be delivered.

These machines here, your Honor, could be altered, in other words, by opening the chute, and on some of these machines these chutes have been opened, and actually under this definition it would be gambling device, but the Federal law does not seek to regulate within the states; it only seeks to regulate against the transportation of these machines. [43]

In other words, if these machines had an open chute and were transported from the state of Illinois to Honolulu, I would say those machines would come under this definition of the Federal law, but that isn't the case here. The machines were transported with closed chutes so that it was physically impossible to have the third element which is necessary to constitute a gambling device, which is the matter of delivering property. It couldn't deliver property. The only way it could deliver property, it would have to be changed within the state or territory, and that is not the purpose of this bill as stated in the report of the House Committee.

When this bill was being proposed, the purpose of this bill, I repeat, is to assist the states in the enforcement in the fields of gambling. On the other hand, the Committee emphasized the Federal law enforcement in the field of gambling cannot and should not be considered a substitute for state and local law enforcement in the field. And I state,

your Honor, that under this clear application of the facts to the law involved here, that these machines when transported from the state of Illinois into the Territory of Hawaii were not gambling devices and therefore the shipment was not illegal.

The Court: Well, suppose they manufactured a faro wheel in one state. The manufacturer made a puka in the [44] bottom of each cup so that it could hold a marble. Therefore, it could be used for gambling purposes in that state in that condition. But the recipient of the machine in another state could easily put plugs that might be furnished to him and devised by himself in these holes of the faro wheel. Would or would not that be a shipment, would it not be a violation of that law, Mr. Lee?

Mr. Lee: I didn't quite get the facts.

Mr. Richardson: I think I did, if your Honor please. That would be a machine designed and intended just exactly as these things are. As a matter of fact, if the Court please, there is a case, a state case, an Alabama case, which I also found. I didn't bring it into Court, but it holds that a shipment of a part of the roulette wheel, not the whole thing, was a gambling device. Give me five minutes.

The Court: I said faro, I meant roulette, that is what I meant to be talking about. Faro is a card game. I am not so very familiar with gambling or gambling devices, but it was a roulette wheel I had in mind for I have seen them.

It takes two combinations to make them work. One would be the marble, and without the marble you couldn't do any gambling.

Mr. Lee: That is right.

The Court: If the manufacturer sent just [45] the machine without the marble, would he be transporting a gambling machine?

Mr. Richardson: He would be transporting one if it was designed and manufactured to be used as a gambling machine.

Mr. Lee: Are you talking about a roulette wheel or faro wheel?

The Court: No, not faro. Faro is a card game. I misused that.

Mr. Lee: You are talking about a roulette wheel?

The Court: Yes.

Mr. Lee: I might even go so far as to point out the distinction between shipment of a part of a roulette wheel which is very clearly the type of a machine which is intended for gambling as being one example, and yet I can think of other types of roulette wheels which may not be a gambling device.

For instance, they have these little games they ship here used by the schools and by the children. It is a cardboard, and they have so many buttons in which you can play among yourselves or in the family. It is a family type of thing. In my mind that type of a roulette part or assembly is not a gambling device, while the ones in the regular type of a roulette wheel which is used in houses of gambling, that is a professional type. I think the [46] Court knows what I am talking about, a professional type.

The Court: I do.

Mr. Lee: That would be considered a gambling device. But again, I point out these machines are

Hollycrane machines. They are claw machines. For instance, if they were slot machines, that is a different story. You can see they would be intended and designed and manufactured for gambling, but these machines with closed chutes are designed and manufactured so that you couldn't deliver, when operated, any property. That type of machine is not the type of machine that is covered under this Act, whereas the type of machine which has an open chute, those type of machines are designed and manufactured to be used for gambling devices. And that is the distinction between this case and the other type of case.

Mr. Richardson: When that chute was removed, if your Honor please, after the machines got here, as I understand some of them were, then that machine was capable of enjoying the function for which it was designed and manufactured. That is the only function that it is capable of being used for, for which it was designed and manufactured. And the fact that it was closed while it was in the process of transportation still brings it under the Act because it is, nevertheless, a machine designed and manufactured for use as a gambling device. [47]

Mr. Lee: Now, if your Honor please, from counsel's remarks one has the impression that these closed chutes is just something that you unfasten and you can open. That isn't the case. These fasten with explosive bolts. You can't open it. It is physically impossible. You have to use an electric drill, which requires a complete alteration of the machine before it can be used as stated by the government.

Mr. Richardson: I understand some of them were removed, though.

Mr. Lee: Oh, yes; but it has to be done by a process which is not normal for that type of machine.

Mr. Richardson: I will agree they were all sealed.

Mr. Lee: By explosive bolts.

The Court: This is my view: the machines as they arrive here, being not capable of delivering any merchandise, they are outside of the Act. If, after their arrival, they are, by any alteration made in the mechanism or structure, turned into machines that are within the Act, they should be proceeded against and confiscated.

Mr. Richardson: If your Honor please, we can't do that.

The Court: Perhaps that is so. It would be a matter for the local authorities. I think that would be so. [48] They didn't cross the state line in that condition and they would have to be altered. But that is the view I take, Mr. Richardson. I think that Act didn't foresee far enough, and the manufacturers beat them to the rap. It looks like that to me.

Mr. Richardson: Yes, sir.

The Court: Some Courts might take a different view, but that is mine.

Mr. Richardson: If the Court please, I think this is a new question. As your Honor knows, this is a new law. It hasn't been in effect very long. I

don't even know if it has been passed any other place. It is rather a new question to us out here.

The Court: I think it ought to be tightened up to meet a situation like this. If the government still believes in the general design and intent that machine was intended as a chance to deliver merchandise to the lucky player, that would be gambling I suppose in any definition. But as it stands now, I don't believe you have a case.

Mr. Richardson: All right, sir.

Mr. Lee: Thank you, your Honor.

(Court adjourned at 10:45 o'clock a.m.) [49]

Reporter's Certificate

I, Mary V. Totushek, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings reported by me in Civil No. 1123, United States of America vs. Twelve (12) Hollycrane "digger" type coin-operated machines, held in the above-named court on February 26, 1952, before the Hon. Delbert E. Metzger, Judge.

May 9, 1952.

/s/ MARY V. TOTUSHEK. [50]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United

States District Court for the District of Hawaii, do hereby certify that the record on appeal in the above-entitled cause consists of a statement of the names and addresses of the attorneys of record, and of the various pleadings, transcript of proceedings, and other papers as hereinbelow listed; that all of said pleadings, transcript of proceedings and other papers consists of original papers filed in my office and are accompanied by this certificate and that the pages of the certified record at which said pleadings, transcript of proceedings and other papers appear are as hereinbelow indicated:

Original Papers



In Witness Whereof, I have hereunto set my

hand and affixed the seal of said Court this 21st day of May, A.D. 1952.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of Hawaii. [52]

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[Endorsed]: No. 13398. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Tamotsu Fujisaki and Raymond C. L. Cheong, Owners of Twelve (12) Hollycrane "Digger" Type Coin-Operated Machines, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed May 26, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Libellant-Appellant,

vs.

TWELVE (12) Hollycrane "Digger" Type Coin-Operated Machines,
Respondent-Appellee.

## STATEMENT OF POINTS TO BE RELIED UPON BY LIBELANT-APPELLANT ON APPEAL

Comes now the United States of America, Appellant in the above-entitled cause, by Howard K. Hoddick, Acting United States Attorney for the District of Hawaii, and, pursuant to the provisions of Rule 19 (6) of the Rules of Practice for the United States Court of Appeals for the Ninth Circuit, hereby states that the Appellant, in taking this appeal, relies upon the following:

1. The judgment of the United States District Court for the District of Hawaii, entered and filed on March 10, 1952, decreeing that the respondent-appellee property consisting of twelve Hollycrane Machines bearing serial numbers: 1525-30, 1526-30, 1528-30, 1529-30, 1530-30, 1459-30, 1460-30, 1461-30, 1462-30, 1463-30, 1466-30 and 1468-30, were not gambling devices at the time of their shipment from the State of Illinois to the Territory of Hawaii, and that said shipment was not in violation of Public

Law 906, Sections 1171-1177, Title 15, United States Code, is contrary to law and to the evidence, in that respondent-appellee property at the time of said shipment fell within the definition of the term "gambling device" as used in Section 1171 (a), Title 15, United States Code, and that consequently the shipment of respondent-appellee property was in violation of Section 1172, Title 15, United States Code, and was subject to confiscation and forfeiture under the provisions of Section 1177, Title 15, United States Code.

By reason of said error, the judgment directing the return of respondent-appellee property to Tamotsu Fujisaki and Raymond C. L. Cheong should be reversed.

Dated at Honolulu, T. H., this 9th day of May, 1952.

/s/ HOWARD K. HODDICK,

Acting United States Attorney, District of Hawaii, Attorney for Appellant.

[Endorsed]: Filed May 26, 1952.

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[Title of Court of Appeals and Cause.]

## DESIGNATION OF RECORD TO BE PRINTED ON APPEAL

Comes now the United States of America, Appellant in the above-entitled cause, by Howard K. Hoddick, Acting United States Attorney for the

District of Hawaii, and hereby designates for inclusion in the printed record on appeal, the following:

1. Libel of Information, filed January 14, 1952.
2. Order Amending Libel, filed February 20, 1952.
3. Answer to Amended Libel of Information.
4. Order filed March 5, 1952.
5. Order denying Libelant's proposed findings, filed March 6, 1952.
6. Order submitted to Court by Libelant and refused, filed March 6, 1952.
7. Judgment filed March 10, 1952.
8. Transcript of Proceedings had on February 26, 1952.
9. Clerk's Docket Entries.
10. Notice of Appeal.
11. Statement of Points to Be Relied Upon by Appellant.
12. Designation of Record on Appeal.
13. This Designation of Record to Be Printed on Appeal.

Dated at Honolulu, T. H., this 9th day of May, 1952.

/s/ HOWARD K. HODDICK,
Acting United States Attorney, District of Hawaii,
Attorney for Libelant.

[Endorsed]: Filed May 26, 1952.